

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2011-000398-001 DT

01/19/2012

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT

K. Waldner

Deputy

DISCOVER BANK

PAUL D GUGLIELMO

v.

VICTORIA PARKER BOND (001)

VICTORIA PARKER BOND

1547 E DRIFTWOOD DR

TEMPE AZ 85283

REMAND DESK-LCA-CCC

UNIVERSITY LAKES JUSTICE COURT

RECORD APPEAL RULING / REMAND

**Lower Court Case No. CC2010240904RC**

Defendant Appellant (Defendant) appeals the University Lakes Justice Court's determination that she is indebted to Plaintiff. Defendant contends the trial court erred. For the reasons stated below, the court affirms the trial court's judgment.

**I. FACTUAL BACKGROUND.**

On May 12, 2010, Plaintiff filed a complaint alleging Defendants owed \$7,873.72 plus interest. Defendant was served on July 9, 2010, by the process server (1) personally handing a copy to Defendant's spouse at 1547 E. Driftwood Dr., Tempe, Ariz. 85283 and (2) mailing a copy to her via first class mail.<sup>1</sup>

Defendant failed to answer. Plaintiff filed an application for default on August 2, 2010, at the justice court. That document indicated entry of default on August 9, 2010. The mailing certificate was not filled out but the document includes language indicating it was mailed to Defendant. On September 2, 2010, Plaintiff filed an "Affidavit and Motion for Judgment" which the trial court granted. On September 10, 2010, the trial court signed a judgment granting Plaintiff \$7,873.72 for the principal amount of the debt, \$166.00 in costs and \$500.00 for attorney fees with interest on the principal at 25.24 % until September 10, 2010, and interest on the remainder at the rate of 10% per annum.<sup>2</sup>

---

<sup>1</sup> Prior to effecting service, the process server made three attempts to serve Defendant at her Tempe home and, when this proved to be unsuccessful, obtained an Order authorizing an alternative method of service.

<sup>2</sup> The trial court file contains a copy of the Discover Card Account Agreement and a copy of a billing statement in Defendant's name.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2011-000398-001 DT

01/19/2012

Defendant moved to set this judgment aside and alleged she failed to receive timely notice of the application and affidavit of default. In her Motion, Defendant claimed (1) she was out of state for several months because of her mother's illness and subsequent death; and (2) she was not aware of the judgment until she received a copy of her credit report which listed the judgment. When her Motion to Set Aside was denied, Defendant followed with a Motion for Reconsideration.

In her Motion for Reconsideration, Defendant sought relief under Rule 60 (c) A.R.C.P. and claimed excusable neglect. She stated she was out of the state for almost a year to care for her terminally ill mother. She claimed she did not have her mail forwarded during this time because (1) she did not know how long she would be away; and (2) did not believe she would receive any important communications.<sup>3</sup> Defendant argued that because she conducted her important correspondence via e-mail, it was reasonable to expect Plaintiff to try to contact her by e-mail. Defendant also argued Plaintiff failed to support its claim with any original signed contract, itemized statement, or billing for the alleged debt. Defendant did not provide any accompanying statement of facts, evidence, or affidavit to factually support her position. The trial court denied Defendant's motion and ruled it did not find either excusable neglect or a meritorious defense.<sup>4</sup>

Defendant filed a timely appeal. In her appellate memorandum, she stated she learned of her mother's worsening condition in August, 2009, and "went immediately" to assist with her mother's care.<sup>5</sup> Defendant stated she chose not to have her mail forwarded because of the uncertainty of her situation and because she believed all her necessary mail would be delivered via electronic mailing. Defendant's mother died on February 3, 2011. Thereafter, Defendant remained in Arkansas because she believed this would help her retain ownership of her mother's home as she is a "disabled child" according to Arkansas law.

This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12-124(A).

II. ISSUES:

*A. Did the Defendant Properly Present Her Issues On Appeal.*

Defendant failed to comply with the mandates of Rule 8(a) (3), Super. Ct. R. App. P.—Civil, which states:

Memoranda shall include a short statement of the facts with reference to the record, a concise argument setting forth the legal issues presented with citation of authority, and a conclusion stating the precise remedy sought on appeal.

---

<sup>3</sup> Defendant's Motion to Reconsider at p. 3, ll. 24-25; p. 4, ll. 1-11.

<sup>4</sup> Ruling on Motion for Reconsideration dated March 21, 2011.

<sup>5</sup> Appellant's Opening Brief, at p. 2, ¶ 3. Because Appellant failed to use lined paper, all references will be to page and paragraph.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2011-000398-001 DT

01/19/2012

Defendant submitted a memorandum but did not appropriately and specifically present citations to authority or reference the record. She failed to (1) provide any reference to the record; (2) cite to any facts properly provided to the trial court; and (3) provide legal support for her argument on excusable neglect.

*B. Did The Trial Court Abuse Its Discretion By Failing To Set Aside The Default Judgment.*

In reviewing a trial court's decision to grant or deny a motion to set aside a default, the appellate court views the facts in the light most favorable to upholding the trial court's ruling. *Goglia v. Bodnar*, 156 Ariz. 12, 20, 749 P.2d 921, 929 (Ct. App. 1987). The trial court's decision will not be set aside absent a clear abuse of discretion. *Hirsch v. National Van Lines, Inc.* 136 Ariz. 304, 666 P.2d 49 (1983). Review is limited to questions raised in the motion to set aside. *Goglia v. Bodnar, id.*, 156 Ariz. at 16, 749 P.2d at 925. However, if the undisputed facts require a different ruling as a matter of law, the appellate court may reverse. *Coconino Pulp and Paper Co. v. Marvin*, 83 Ariz. 117, 119, 317 P.2d 550, 551 (1957).

Defendant correctly states the standard of review as that of abuse of discretion and correctly cites to *State v. Chapple*, 135 Ariz. 281, 297 n. 18, 660 P.2d 1208, 1224 n. 18 (1983) for standard language about when a court abuses its discretion. As stated in *State v. Chapple, id.*, "where there are few or no conflicting procedure, factual, or equitable consideration" it is this Court's duty to "look over the shoulder" of the trial judge, and, "if appropriate," substitute this Court's judgment for that of the trial court. Defendant is also correct where she paraphrases the standard that equity abhors a default. Aside from boilerplate language about discretion, however, Defendant must demonstrate the trial court erred in failing to set the default aside. To do so, she must show (1) excusable neglect on her part; and (2) she has a meritorious defense to the action.

The basis for Defendant's excusable neglect claim appears to be: (1) she did not know how long she would be out of state when she initially left to care for her mother; and (2) consequently did not receive mail informing her of the legal proceedings. To determine if Defendant's situation falls within the ambit of excusable neglect, this Court must analyze Defendant's actions to determine if she provided the trial court with a sufficient basis to find excusable neglect. In addition, this Court must balance the competing concerns of deciding cases on their merits *Hirsch v. National Van Lines, Inc, id.*, 136 Ariz. at 308, 666 P.2d at 53 with the competing need for cases to be finally resolved *Addison v. Cienega, Ltd.*, 146 Ariz. 322, 323, 705 P.2d 1373, 1374 (Ct. App. 1985).

Defendant asserted her actions in handling her mail are the acts of a reasonable and prudent person when dealing with the circumstances she faced. This Court first notes Defendant failed to support this position in her Motion To Set Aside. Her Motion To Set Aside lacks supporting evidence, affidavits, and facts. The trial court is only able to rule on the facts and law presented to it. Defendant failed to provide these.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2011-000398-001 DT

01/19/2012

Defendant also failed to provide any factual basis in her later Motion for Reconsideration. In addition, she did not—in either motion or in this appeal—demonstrate why her continued failure to have her mail forwarded—once it became apparent she would remain out of state for a considerable time period—is excusable neglect. Defendant posited she needed to spend several days and nights at a time in various hospitals “as much as an hour and a half from her mother’s home” and explained there was no one available at the local address to ensure mail was collected for her.”<sup>6</sup> This Court has no knowledge about her specific circumstances. However, U.S. post offices do maintain post office boxes and mail can safely be placed in these post office boxes for a period of days and be retrieved at the box owner’s convenience. Although Defendant claimed—on appeal—forwarding mail to Arkansas and then back to Arizona is a “logistical nightmare,” Defendant failed to provide any support—factual or legal—for this contention.<sup>7</sup>

Defendant asserted her solution to any mail issues was to have “someone regularly gather her mail, look over it and notify her if there appeared to be anything noteworthy.”<sup>8</sup> She further claims she “took into account the nature of the postal mail she was accustomed to receiving.”<sup>9</sup> Finally, Defendant maintained she regularly had her bills delivered by e-mail and “in such a digital world as we now live, it is certainly not unreasonable to expect anyone who has urgent information to attempt an email contact.”<sup>10</sup> Defendant concluded by asserting<sup>11</sup> she behaved as a reasonably prudent person—the standard for demonstrating excusable neglect<sup>12</sup>—under the circumstances. This Court disagrees with Defendant’s conclusion. Because Defendant (1) did not show failing to provide a forwarding address for mail under circumstances where one must care for an ailing relative in another state is the act of a prudent person; (2) failed to provide a reason why she did not have her mail forwarded other than to say it was “a logistical nightmare;” (3) failed to provide an affidavit giving any sworn testimony about the reasons underlying her decision to fail to forward her mail;<sup>13</sup> and (4) did not provide any information about the person entrusted with forwarding her mail or the circumstances under which it was forwarded, this Court does not believe Defendant showed she acted as a reasonable person.

Arizona has a dearth of cases dealing with circumstances where a party fails to provide a forwarding address for mail. Other states, however, provide some guidance for this issue. In *Griffin v. Scott*, 218 Mont. 410, 710 P.2d 1337 (Mont. 1985), the Montana Supreme Court

---

<sup>6</sup> Id. at p. 7, ¶ 4. This Court notes Defendant did not support any of her assertions with an affidavit or other facts.

<sup>7</sup> This assertion, too, is not supported by any fact or affidavit.

<sup>8</sup> Id. at p. 8, ¶ 2.

<sup>9</sup> Id. at p. 8, ¶ 3.

<sup>10</sup> Id. at p. 9, ¶ 2.

<sup>11</sup> Id. at p. 9, ¶ 3.

<sup>12</sup> See *Coconino Pulp & Paper Co. v. Marvin, id.*, 83 Ariz. at 120, 317 P.2d at 552, where the Arizona Supreme Court stated the standard for determining excusable neglect is “whether the neglect or inadvertence is such as might be the act of a reasonably prudent person under the same circumstances.”

<sup>13</sup> It is easy to have mail forwarded and a person can fill out the needed “paperwork” to have mail forwarded on a temporary basis over the Internet if desired.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2011-000398-001 DT

01/19/2012

considered whether an attorney's failure to read his mail for a 5-week period was excusable or inexcusable neglect. The Court determined the neglect was not excusable. In *Griffey v. Rajan*, 33 Ohio St.3d 75, 514 N.E.2d 1122 (Ohio 1987) the Ohio Supreme Court explored the concept of excusable neglect where Defendant's malpractice insurance company failed to answer a complaint and stated it "refused to let Civ. R. 60(B) serve as an emasculation of the pleading rules and time limits." In *Griffey v. Rajan, id.*, 33 Ohio St.3d at 79, 514 N.E.2d at 1126, the trial court found Defendant's explanation that the failure to file an answer was due to a "breakdown in routine channels of communication" between the defendant and an insurance carrier was indicative of neglect rather than an excuse for the neglect. In ruling, the *Griffey v. Rajan, id.*, court held the neglect is not excusable where the conduct of the defendant "exhibited a disregard for the judicial system and the rights of the plaintiff." *Id.*, 33 Ohio St.3d at 80, 514 N.E.2d at 1126. In *Tyler v. Keeney*, 128 Idaho 524, 915 P.2d 1382, (Ct. App. Idaho 1996), the Court of Appeals of Idaho ruled on a case where a defendant claimed he failed to receive notice of his counsel's withdrawal from his case because he "no longer lived in Peck." In ruling on this issue, the Idaho Court of Appeals held a reasonably prudent person would have made arrangements for someone to monitor his mail while he was away or would have provided his attorney with a forwarding address. Like the case before this court, the litigant in *Tyler v. Keeney, id.*, made no provision to have his mailed forwarded after he moved from Idaho. The court held his conduct was not the conduct of a reasonable person under the circumstances. *Tyler v. Keeney id.*, 128 Idaho at 527, 915 P.2d at 1385.

The case before this Court parallels *Tyler v. Keeney id.*, in that Defendant did not have her mail forwarded. Although Defendant asserts she had someone "regularly gather her mail" she argued she could not recall whether that person mentioned "correspondence from the Appellee." Defendant's husband was served with the lawsuit; therefore, she should reasonably have been put on notice that she might expect court documents in the mail. At that point—if not earlier—a reasonable and prudent person would have arranged to get her mail forwarded. Defendant never notified the trial court that she (1) did not receive mail or (2) had a different address. Even if Defendant were not legally trained,<sup>14</sup> a reasonable and prudent person would take steps to notify the Court about that person's actual address once the person became involved in a legal matter. This Court is cognizant about the trend to file documents electronically. However, the trend toward using electronic filings does not excuse Defendant for failing to provide a way to receive mail. Even assuming Defendant seldom received any mail of consequence, reasonable persons may expect that they might receive mail that can affect them.<sup>15</sup>

Defendant also asserted excusable neglect because Plaintiff allegedly failed to apprise her of the Application and Affidavit of Default. She based this claim on the August Application and Affidavit of Default where the mailing certificate is blank. While Defendant is correct is

---

<sup>14</sup> Although not practicing, Defendant is a lawyer.

<sup>15</sup> As an attorney—albeit not practicing at this time—Defendant should be aware that mail as opposed to e-mail forms a major way in which to contact others, particularly in legal matters.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2011-000398-001 DT

01/19/2012

asserting the technical problem about the blank mailing certificate at the bottom of the page, the text of the “Application And Default” [sic] states the following:

The undersigned, being first duly sworn, upon oath deposes and says:

1. I am the Plaintiff, or said parties’ attorney.
2. The following parties failed to plead or otherwise defend:

Victoria Parker Bond

3. Check one:

XX I mailed a copy of this application and affidavit to the defaulting parties at the following address: 1547 E. Driftwood Dr. Tempe, AZ 85283–2112 on July 30, 2010.

Because Plaintiff included the mailing language in the body of the Affidavit, this Court finds Defendant was properly notified about the pending default proceeding. Rule 55 (b) A.R.C.P. requires a Plaintiff to mail a copy of the application for entry of default to the party claimed to be in default. The rule does not mandate a special mailing certificate.

The trial court did not explain the basis for its ruling. Consequently this Court lacks information to determine if the trial court balanced the competing interests, ruled because of judicial policy, or made a determination based on facts or credibility. While this Court recognizes the law favors resolution on the merits, *Richas v. Superior Court of Arizona In and For Maricopa County*, 133 Ariz. 512, 514, 652 P.2d 1035, 1037 (1982), the Court must balance this right to a decision on the merits against the rights of the plaintiff to have finality. This Court is not unmindful of the stress inherent in a family member’s terminal diagnosis. This does not excuse a person from taking care of his or her affairs. Individuals experience stress from illness, loss of jobs, financial problems, and personal events. If this Court were to find failing to properly handle one’s personal obligations—such as responding to mail—excuses that individual from his or her legal obligations, a great number of judicial determinations would be vacated.

*C. Did Defendant Demonstrate She Has A Meritorious Defense.*

Even assuming Defendant was able to show excusable neglect—which this Court does not believe she demonstrated—Defendant must also demonstrate a meritorious defense. Defendant failed to meet this burden and show she had a meritorious defense. Instead of affirmatively demonstrating her defense, Defendant chose to attack Plaintiff’s complaint. Arizona is a notice pleading state. *Anserv Ins. Service, Inc. v. Albrecht In and For County of Maricopa*, 192 Ariz. 48, 960 P.2d 1159 ¶ 5 (1998); *Mobilisa, Inc. v. Doe*, 217 Ariz. 103, 170 P.3d 712 ¶ 23 (Ct. App. 2007). While disclosure and discovery rules provide required details, no plaintiff has the obligation to provide either disclosure or discovery until the issues have been joined. In this case, Defendant did not respond and was defaulted. Because Defendant was (1) defaulted and (2) challenged the trial court’s failure to set aside the default, the Defendant has the burden of

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2011-000398-001 DT

01/19/2012

showing her entitlement to relief. *Blair v. Burgener*, 226 Ariz. 213, 245 P.3d 898 ¶ 7 (Ct. App. 2010). Defendant must show she had a meritorious defense. She failed to do so.

In conclusion, this Court determines Defendant failed to give the trial court any reason to believe she acted as a reasonable and prudent person under the circumstances. Because she (1) did not support her excusable neglect claim and (2) did not demonstrate any meritorious defense, the trial court did not err in failing to set aside the default. When a default judgment occurs because a party is neglectful, that party must suffer the consequences of its own neglect.

III. CONCLUSION.

Based on the foregoing, this Court concludes the University Lakes Justice Court did not err.

**IT IS THEREFORE ORDERED** affirming the judgment of the University Lakes Justice Court.

**IT IS FURTHER ORDERED** remanding this matter to the University Lakes Justice Court for all further appropriate proceedings.

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

/s/ Myra Harris

THE HON. MYRA HARRIS

Judicial Officer of the Superior Court

011920121645